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No. 84-653

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROBERTA SCHLEIFER,

Petitioner,

vs.

THE CHILDREN'S MEMORIAL HOSPITAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, Roberta Schleifer ("Schleifer"), was terminated on August 23, 1977 from her employment as a cardiac catheterization technician with Respondent, The Children's Memorial Hospital ("Hospital"),[1] a not-for-profit institution devoted to the care and treatment of sick children

[1] The Hospital has no parent companies, subsidiaries or affiliates within the terms of Rule 28.1 of the Rules of this Court.

(R. 1, 10).[2] After unsuccessfully pursuing her claims of sex discrimination before the Equal Employment Opportunity Commission and the Illinois Fair Employment Practices Commission, she filed a pro se Complaint on August 21, 1980 (R. 1, 2, 10, 47). Shortly thereafter, retained counsel appeared on her behalf and, since November 6, 1980, she has continuously been represented by retained counsel in this litigation (R. 13, 37, 39).

Schleifer's Amended Complaint alleged that the Hospital violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., by discriminating against her on the basis of her sex in three ways: by terminating her "for trivial or non-existent reasons . . . not applied to male personnel similarly situated"; by paying her "less than the prevailing rate paid to men"; and by subjecting her to "sexual harassment . . . which [was] reasonably perceived by [her] as implied conditions for advancement, raises and continued employment." Schleifer sought reinstatement as well as back pay.

During the five days of the bench trial, evidence was presented on the three claims set forth in the Amended Complaint as well as on a claim raised by Schleifer at the trial, but not contained in her Amended Complaint, relating to alleged discrimination in job assignment.[3]

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[2] References designated as "R.____" are to documents in the certified record on appeal filed with the United States Court of Appeals for the Seventh Circuit. References designated as "A-____" and "B-____" are to the appendices to Schleifer's Petition For a Writ of Certiorari. References designated as "Tr. ____" are to pages of the trial transcript in this case. References designated as "Pet. ____" are to Schleifer's Petition For a Writ of Certiorari.

[3] Schleifer claimed that her male co-worker never cleaned up after catheterizations (Tr. 84) and that he was allowed to do research (Tr. 85-6).

In her case in chief, Schleifer called herself as well as three other witnesses (Tr. 3-323). Of the three witnesses called on her behalf, two were former co-workers who testified only with respect to purported discrimination in job assignment (Tr. 3-34). The third witness for Schleifer was her father who testified only regarding his receiving calls for her to come in other than at her scheduled time (Tr. 35-42). Schleifer testified extensively regarding alleged discrimination in job assignment, the facts underlying her discharge and alleged sexual harassment and physical abuse by several male doctors and co-workers at the Hospital (Tr. 43-323).

The Hospital presented five witnesses, a co-worker (Tr. 325-453), the two cardiologists who headed the department in which Schleifer had worked (Tr. 453-515 and 516-62), a Hospital personnel representative who had investigated Schleifer's discharge (Tr. 563-612) and Dr. James Cavanaugh, an expert witness psychiatrist (Tr. 615-63). Dr. Cavanaugh was the only witness to testify about Schleifer's psychiatric condition. He did so both with respect to the question of her credibility as a witness about alleged events of sexual and physical abuse as well as with respect to the question of her claim for reinstatement.[4]

REASONS FOR DENYING THE WRIT

A. Schleifer's Petition Arguments Do Not Justify The Grant Of Certiorari In This Case.

In her Petition, Schleifer offers two reasons why certiorari is appropriate in this case. First, she argues that the testimony of Dr. Cavanaugh "was given abnormal weight

[4] Dr. Alexander Muster, the supervisor of the catheterization laboratory, also testified regarding Schleifer's claim for reinstatement (Tr. 49, 542).

and significance" (Pet. 9). Second, she requests the Court to "provide adequate guidance to the District Courts on the use of impeaching psychiatric testimony" (Pet. 14).

Schleifer's disagreement with the weight accorded by the trial court to the expert testimony is not sufficient justification for review by this Court. Indeed, by its very nature that argument demonstrates that the issue is one unique to the particular facts and circumstances of this case, i.e., whether in the context of all the evidence presented on all the issues in this case, the trial judge accorded "abnormal weight" to the expert testimony. Clearly, this is not an issue involving a conflict of decisions or circuits. Nor is it an issue with any significance beyond this case as it merely addresses how *this* evidence was weighed in *this* case. Essentially, therefore, Schleifer is asking this Court to review a District Court's weighing of evidence. That is a role this Court has consistently declined to play.

Schleifer's second argument in support of her Petition is similarly without merit. Schleifer asserts that the District Courts need guidance on the admissibility of impeaching psychiatric testimony and suggests that the problem extends far beyond this case (Pet. 14).

First, contrary to Schleifer's suggestion regarding the broad scope of the purported problem, only a very few reported cases have even addressed the issue of impeaching psychiatric testimony and these are all criminal cases (Pet. 15-18). Neither Schleifer nor the Hospital has discovered any reported civil case raising the issue.

Second, all the appellate courts which have addressed themselves to the issue of the admissibility of impeaching psychiatric testimony have uniformly held that the admission of such testimony, as well as the weight it is to be accorded, is a matter best left to the broad dis-

cretion of the trial judge. See, e.g., *United States* v. *Gutman*, 725 F.2d 417, 420 (7th Cir. 1984); *United States* v. *Lopez*, 611 F.2d 44, 46 (4th Cir. 1979); *United States* v. *Glover*, 588 F.2d 876, 878 (2d Cir. 1978); *United States* v. *Pacelli*, 521 F.2d 135, 140 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *United States* v. *Honneus*, 508 F.2d 566, 573 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *Sinclair* v. *Turner*, 447 F.2d 1158, 1163 (10th Cir. 1971), *cert. denied*, 405 U.S. 1048 (1972). In so holding, the appellate courts have followed the express direction of this Court in *Hamling* v. *United States*, 418 U.S. 87, 108 (1974), in which it was stated that ". . . the District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony."

Third, Schleifer's argument that the appellate courts have provided no guidance to the District Courts regarding the admissibility of impeaching psychiatric testimony is simply not correct. For example, in the decision below, the Seventh Circuit, showing itself extremely sensitive to the issue, set forth clear standards for the admission of such testimony, stating as follows:

> . . . the decision whether psychiatric testimony should be allowed hinges on whether a witness's mental capacity has become relevant to her or his credibility. For example, such evidence has not been allowed when alleged mental problems of a witness occurred at a time not relevant to that witness's testimony. E.g., *United States* v. *Diecidue*, 603 F.2d 535, 551 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). Moreover, psychiatric testimony, if only minimally probative, may be manifestly unfair and thus excludable under Federal Rule of Evidence 403. See *United States* v. *Lopez*, 611 F.2d 44, 45 (4th Cir. 1979). Also, as the Fifth Circuit noted in *United States* v. *Wertis*, 505 F.2d 683, 695 (5th Cir. 1974), *cert. denied*, 422 U.S. 1045 (1975), if the psychiatric testimony relates only to whether

> the witness would have a tendency to be reliable in distinguishing truth from non-truth rather than a witness's capacity or competency as in *Partin*, then it should not be allowed.
>
> • • •
>
> The particular facts of this case justify the district court's decision to admit expert psychiatric testimony regarding the plaintiff's credibility. When such testimony is relevant to the time and events about which the witness is testifying and is highly probative of the witness's capacity and competency, then its value may outweigh any prejudicial effects and potential unfairness to the witness.

(A-7, 9).

Other appellate courts have provided similar guidance to the District Courts regarding the admissibility of impeaching psychiatric evidence. Thus, for example, in *United States* v. *Lopez*, 611 F.2d 44, 46 (4th Cir. 1979), the court concluded that such testimony was admissible if "probatively related to the time period about which he was attempting to testify," went "to the witness' qualification to testify and ability to recall," and was "not 'introduce[d] into the case [as] a collateral issue which would confuse the jury'" (citations omitted). See also, *United States* v. *Glover*, 588 F.2d 876, 878 (2d Cir. 1978).

B. Significant Considerations Militate Against A Grant Of Certiorari In This Case.

As the foregoing demonstrates, Schleifer's arguments in support of her Petition are not persuasive as to the need for review by this Court of the consistent decisions of the two courts below. Moreover, other considerations militate against such review. The dearth of cases in which the issue of the admissibility of impeaching psychiatric testimony has been raised and the absence of any reported civil action

raising the issue strongly suggest that there is not a widespread problem here necessitating direction by this Court.

Also, Schleifer has failed to show how the issue for which she seeks review has any significance constitutionally, statutorily, jurisdictionally, procedurally or even factually.

Finally, as a review of the decision of the court below makes clear, this case as a whole has been decided properly and the issue of impeaching psychiatric testimony has been resolved correctly in the context of the particular factual circumstances presented to the trial judge and within the standards articulated by the Seventh Circuit for the admission of such evidence.

> We think the Hospital's expert psychiatric testimony was properly admitted under the particular facts of this case. At trial Schleifer complained that co-workers sexually harassed her by speaking crudely to her and at times touching and fondling her. Her pleadings indicated that these incidents caused her mental difficulties. In addition, she claimed that she was fit to return to work. The Hospital's defense in part was that Schleifer was fired because she made mistakes in the laboratory and was unable to follow established work procedures. The Hospital also claimed that Schleifer was unfit for laboratory work. Therefore although mental problems were not the stated reason for her discharge, Schleifer's mental condition was an issue at the trial.
>
> The psychiatric testimony was offered principally to impeach the witness's credibility. It clearly was relevant for that purpose. And we believe its probative value outweighed any prejudicial effects. Schleifer had a history of mental problems. She once was granted a medical leave of absence due to psychiatric problems, and was in psychotherapy for about one year. The psychiarist, after examining Schleifer and reviewing her medical history, determined that she may have

> imagined incidents of abuse resulting from unwarranted distrust of her co-workers one symptom of her problem. Significantly, Schleifer may not have appeared on the stand to be lying, for she may actually have believed she was telling the truth. The psychiatric testimony thus was especially probative of her credibility. Finally, the case was tried to the judge, who is better able than the jury to understand the relevance of the testimony. The testimony directly addressed the witness's capacity and competence, not merely whether she told the truth. The district court did not abuse its discretion by admitting the testimony.

(A-7-8).

Accordingly, Schleifer has failed to show any reasons, much less compelling ones, which would necessitate review by this Court of the decisions below.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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